

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

NEW YORK, NY
LOS ANGELES, CA
HOUSTON, TX
AUSTIN, TX
CHICAGO, IL
PARSIPPANY, NJ
BRUSSELS, BELGIUM

WASHINGTON HARBOUR, SUITE 400
3050 K STREET, NW
WASHINGTON, DC 20007

(202) 342-8400

FACSIMILE
(202) 342-8451
www.kelleydrye.com

AFFILIATE OFFICE
MUMBAI, INDIA

DIRECT LINE: (202) 342-8518
EMAIL: tcohen@kelleydrye.com

November 6, 2017

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: *Ex Parte* Filing of the American Cable Association on Accelerating Wireline
Broadband Deployment by Removing Barriers to Infrastructure Investment,
WC Docket No. 17-84**

Dear Ms. Dortch:

On November 3, 2017, Thomas Cohen (Kelley Drye & Warren LLP, Counsel to American Cable Association (“ACA”)) met with Chairman Pai’s Senior Counsel, Nicholas Degani, and Wireline Advisor, Jay Schwarz, to discuss the proposed order and further activities in the above-referenced docket¹ concerning barriers in obtaining access to poles pursuant to Section 224 of the Communications Act.² ACA supports the proposed order’s pole attachment reforms to exclude from pole attachment rates capital costs recovered via make-ready fees and to establish a 180-day shot clock for resolution of pole access complaints.³ ACA also supports the

¹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC-CIRC1711-04 (Oct. 26, 2017) (“*Wireline Broadband Deployment Proposed Order/FNPRM*”); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (“*Wireline Broadband NPRM*”).

² 47 U.S.C. § 224.

³ ACA continues to believe that the shot clock should apply to other pole attachment complaints and intends to file comments in the *Complaint Procedures NPRM* providing the rationale for such an extension. *See Wireline Broadband Deployment Proposed Order/FNPRM*, para. 14; *Amendment of Procedural Rules Governing Formal Complaint*

Marlene H. Dortch
November 6, 2017
Page Two

proposed rulemaking to address requests by attachers to overlash existing wires or install drops from poles to customers without filing pole attachment applications.⁴ The Commission has consistently found that these activities do not require attachment applications,⁵ and courts have agreed with the Commission and upheld this policy in the face of challenges by utilities.⁶ Yet, despite these unambiguous rulings, ACA members that are seeking to overlash or install drops continue to face utilities that seek to require them to file applications or overcome other unreasonable barriers before engaging in these activities.⁷ Accordingly, the time has come for the Commission to adopt a rule codifying its policies.⁸

ACA also has recommended, in response to issues noticed in the *Wireline Broadband NPRM*, a variety of measures that would facilitate pole attachments, at least three of which are ripe for adoption:

- First, because of frequent disputes between requesting attachers and utilities about when an attachment application is “complete,” which triggers the start of the

Proceedings Delegated to the Enforcement Bureau, Notice of Proposed Rulemaking, 32 FCC Rcd 7155, 7160, para. 19 (2017) (“*Complaint Procedures NPRM*”).

⁴ See *Wireline Broadband Deployment Proposed Order/FNPRM*, paras. 159-160.

⁵ See e.g., *Amendment of Commission’s Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 (2001); *Cable Television Ass’n of Ga. v. Ga. Power Co.*, File No. PA 01-002, Order, 18 FCC Rcd 16333, 16340-41, para. 13 (EB 2003).

⁶ See *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002) (affirming the Commission’s 2001 ruling).

⁷ See *Ex Parte* Letter from Thomas Cohen, Counsel to American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2-4 (Sept. 14, 2017) (“*ACA Ex Parte*”).

⁸ *Id.* ACA has recommended that the Commission adopt in a rule a “notify and attach” process for overlashing, with a brief notice period, and an “attach and notify” process for installing drops. *Id.* at 3. In the case of overlashing, this would enable the utility to determine in advance whether an attachment might harm pole safety or reliability, and both for overlashing and installing drops, the utility would be able to conduct a post-attachment audit to assess whether the work was done properly, with the attacher responsible for any damages or further work necessitated by noncompliant attachments. *Id.*

Marlene H. Dortch
November 6, 2017
Page Three

timeline, the Commission should address and clarify its rule.⁹ ACA proposes the following:¹⁰

For a pole attachment application to be complete, the requesting attacher needs to supply information that the utility specifies, in a master service agreement or in publicly-released requirements, is necessary to begin to survey the poles. An application shall be deemed complete seven days after it is filed unless the utility informs the requesting attacher and identifies the specific information that has not been provided. In resubmitting an application, a requesting attacher need only provide the “missing” information identified by the utility, and a resubmitted application shall be deemed complete three days after it is filed unless the utility informs that requesting attacher that the identified information has not been provided.

- Second, to facilitate agreement between a requesting attacher and a utility about the need to undertake make-ready work and the extent of such work on specific poles, a utility should be required to give a requesting attacher the option of accompanying it on its field inspection conducted as part of the survey.¹¹ The utility also should invite any existing attachers on affected poles, which would further facilitate the work. The utility should use commercially reasonable efforts to provide advance notice of the survey and field inspection of not less than three days to a requesting attacher and existing attachers.
- Third, because the current self-help remedy when existing attachers do not perform make-ready within the 60-day timeline¹² has proven difficult to invoke,¹³ the Commission should address its flaws and amend the current rule. ACA proposes the following:

The self-help remedy should (1) focus the utility’s role on initial notification of the need for make-ready work by existing attachers and eliminate the utility’s further involvement in self-help make-ready work; (2) enable a requesting attacher to invoke the self-help remedy and

⁹ See *id.* at 4-5.

¹⁰ This amendment could be added to 47 C.F.R. § 1.1420(c).

¹¹ See *ACA Ex Parte* at 6. This amendment could be added to 47 C.F.R. § 1.1420(c).

¹² 47 C.F.R. §§ 1.1420(e), 1.1422.

¹³ See *ACA Ex Parte* at 6-7.

KELLEY DRYE & WARREN LLP

Marlene H. Dortch
November 6, 2017
Page Four

perform make-ready without using a utility's approved contractors;¹⁴ and
(3) require the requesting attacher, when invoking the self-help remedy, to
provide notice to the utility and existing attachers and give them an
opportunity to be present when it performs the make-ready work.

In closing, ACA appreciates the Commission's responsiveness to addressing important
pole attachment barriers and looks forward to working with the Commission to adopt additional
measures.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's
rules.¹⁵

Sincerely,



Thomas Cohen
Kelley Drye & Warren, LLP
3050 K Street N.W.
Washington, DC 20007
202-342-8518
tcohen@kelleydrye.com
Counsel for the American Cable Association

cc: Nicholas Degani
Jay Schwarz

¹⁴ The requesting attacher undertaking the make-ready work should be required to perform
the work in accordance with applicable federal, state, and local laws and regulations and
applicable engineering and safety standards.

¹⁵ 47 C.F.R. § 1.1206.